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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK and WILLIAM J. ZRENCHIK,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Sixth Circuit entered December 2, 1943, denying the application

for bail pending appeal filed by the petitioners in the Circuit Court of Appeals for the Sixth Circuit on November 29, 1943.

The court below entered the order denying bail without opinion.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 [USCA Title 28, Section 347(a)].

The date of the order of the Circuit Court of Appeals is December 2, 1943.

This petition is filed January 8, 1944.

SUMMARY STATEMENT OF MATTER INVOLVED

The essential facts are contained in the petitioners' Application to the Circuit Court of Appeals for Bail, the Answer of the United States and the Reply of the petitioners thereto, all of which are in the record.

The petitioners were indicted April 23, 1943, at Detroit, Michigan, on one count of conspiracy to defraud the United States in connection with war contracts (Title 18, USCA, Section 88) and ten counts charging presentment of false claims to the United States (Title 18, USCA, Section 80). They went to trial July 15, 1943, and the jury returned a verdict of guilty on all counts on No-

vember 4, 1943, the trial having been held continuously in the interval.

The petitioners on November 24, 1943, were sentenced to imprisonment for twelve and seven years respectively and payment of fines. On the same day they filed notices of appeal to the Circuit Court of Appeals for the Sixth Circuit and the trial judge refused bail pending appeal.

At the time of refusal the trial judge stated in open court (pages 23 and 24 of Transcript—Paragraph 1 of Reply of Defendants to the Answer of the United States) that he knew that the defendants' appeal was not merely for the purpose of delay and that there were some legal questions in the case which should be appealed.

The petitioners thereupon, on November 29, 1943, filed a petition for bail pending appeal in the Circuit Court of Appeals. The petition set forth the statement of the trial judge referred to in the preceding paragraph, as demonstrating with finality that the appeal was not for the purpose of delay nor frivolous, and that there were substantial questions involved which should be determined by the Appellate Court, as stated in Rule 6 of the Rules of Criminal Procedure of May 7, 1934. The petition further contained a statement of the facts and issues in the case and the questions raised on appeal and claimed by petitioners to be substantial (Par. 7 of the Petition for Bail).

The essential facts relating to this are as follows:

The petitioners prior to the indictment were reputable and prominent engineers with an established business of several years' standing prior to the war program. As to

matters charged in the indictment, they had no contracts or dealings with the United States. Their contracts were with Ford Motor Company, Chrysler Corporation and General Motors Corporation. The Government theory is that petitioners made charges to these customers that were improper and fraudulent under their contracts, which charges the customers at some later date passed on to the Government as costs under cost-plus contracts between the customers and the Government.

One of the substantial legal questions raised on appeal is whether the petitioners can be brought within the purview of the False Claims Statute in these circumstances. The Government sought to connect petitioners with the United States by showing that petitioners had knowledge that their charges were ultimately to be reimbursed to the customers by the Government. The petitioners claim that the Government's proof on this point was inadequate as a matter of law to take the case to the jury.

Regardless of that point, the petitioners claim on their appeal that the trial judge erroneously instructed the jury on this essential question of knowledge. He charged the jury substantially that if the petitioners had the means to find out that the Government was ultimately to pay these charges, then they would be guilty of causing a false claim to be presented to the Government. We have been able to find no decision which remotely supports that proposition in a false claims case. The facts of the case at bar remove it very far from the decision in *Marcus v. Hess*, 87 L. Ed. 374.

The trial judge also erroneously instructed the jury in substance that there need be no intent to defraud the Government so far as the ten counts of the indictment

charging presentation of false claims are concerned.

The amount of fraud claimed by the Government in the indictment is about $18,000.00. The petitioners denied the challenged charges were fraudulent, but on the contrary were believed, when made, to be proper. The petitioners during the years in question did a business of over two milion dollars on the war program. As going to the question of intent to defraud, the petitioners on the trial offered to prove that by the use of time-saving devices they eliminated charges to customers, which would have otherwise been proper, of over $100,000. Except as to $20,000.00 of this amount the trial judge refused to receive this evidence. The substantial nature of this question is evident. The petitioners were charged with knowingly making fraudulent charges. They claimed they believed them proper. To show they refrained from charges amounting to many times the amount of fraud charged in the indictment, is surely competent evidence that they were not moved to make the latter charges through mere desire for gain.

The above is not a complete list of the substantial questions involved on the appeal.

The Circuit Court of Appeals, on December 2, 1943, heard oral argument on the petition in chambers, bail being opposed by the Government, and on the same day entered the order complained of, refusing bail.

QUESTIONS PRESENTED

The question presented here is: On application for bail pending appeal, where the appeal is not for the pur-

pose of delay, and there are substantial questions to be decided on appeal, should the Court refuse bail; or, if the matter of granting bail under the circumstances outlined be deemed a matter of discretion, is it an abuse of discretion to deny bail?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

The following are the reasons relied on:

1. The Circuit Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

The right of persons to be enlarged on bail pending appeal is an important one. We refer to the question as unsettled because there seems to be no decision of this Court—indeed no clear cut decision of any federal appellate court as to the effect, if any, of Rule 6 of the Rules of Criminal Procedure on the principles laid down in *McKnight v. U. S.*, 113 Fed. 451 (CCA. 6); *Motlow v. United States*, 10 Fed. (2d) 657; and *Hudson v. Parker*, 156 U. S. 277; 39 L. Ed. 424; 15 S. Ct., 450.

Bail after conviction and pending appeal is not a matter of right. This has led some authorities to state that it is a matter of discretion but the more accurate way to put it, it would seem upon analysis of the cases, is that bail, while not generally a matter of right, will become such upon a certain condition, namely that a substantial question on appeal exists. This is the holding of *McKnight v. U. S.*, *supra*, and apart from Rule 6, the law of the

Sixth Circuit, if not of the United States under the holdings of the *Motlow* and *Hudson* cases, *supra.*

This leads to the question: What is the effect of Rule 6 upon the prior law as laid down by these decisions? Is Rule 6 merely declaratory of the principles there announced; or does Rule 6 change the previous rule of law and make the granting of bail a matter of discretion regardless of how meritorious the appeal may be? This is an important and recurring question and one to which no satisfactory answer can be found in the cases adjudicated since the effective date of Rule 6. It is respectfully submitted that this question should be settled by this Court.

2. The Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals. Assuming that bail should be granted where a substantial ground of appeal exists and that Rule 6 requires nothing to the contrary, then the order complained of here conflicts with the decision in *Motlow v. U. S. supra,* (decision by Mr. Justice Butler, sitting as Circuit Justice) as well as with the decision in *McKnight v. U. S., supra.* It is respectfully submitted that this conflict should be resolved by this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In this case it is established, we take it, by the statement of the trial judge, that the appeal is not for the purpose of delay and that substantial questions are involved on appeal; the record itself shows that substantial questions exist. We have been able to find no decision where bail was refused under such circumstances—

and while always hesitant to make so general a statement, we believe no such decisions exist. To show, as here, the existence of substantial questions, leads, in the accepted and usual course of judicial proceedings, to enlargement on bail until the doubt is resolved by the decision of the appellate court. If the convictions of the petitioners are reversed, they will have been imprisoned unjustly; and it is submitted that there is special reason to enforce the accepted and usual course of judicial proceedings where, as here, the nature of the crime of which petitioners are accused, fraud in war contracts, is especially abhorrent, the country being at war, thus inviting a disregard of or indifference to the protection normally afforded defendants by the law.

WHEREFORE, it is respectfully submitted that this petition for Writ of Certiorari to review the order of the Circuit Court of Appeals for the Second Circuit should be granted.

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Dated:
January 8, 1943.

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